# Mah Hong Ching & Anor v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A–05–94 OF 2004
GOPAL SRI RAM, ZULKEFLI AND SURIYADI JJCA
4 OCTOBER 2006

*Criminal Law — Dangerous Drugs — Trafficking — Whether include acts preparatory to the commission of trafficking — Whether acts of 'agreeing to sell', 'offering to sell', 'offering for sale' and 'negotiating a sale' fall within the definition of trafficking — Dangerous Drugs Act 1952 39B(1)(a)*

There are two appellants in this appeal against their conviction on a charge of trafficking in heroin a dangerous drug contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read with s 34 of the Penal Code and punishable under s 39B(2) of the Act. The mandatory death sentence had been passed upon them. The facts that are relevant to this appeal are as follows. A Chinese lady called on ACP Umar AH Saifuddin (PW5) at his office at the anti narcotic branch informing him that she had been threatened by a Chinese man to find a buyer of half a pound of drugs by 3pm on the same day. The police formulated a plan; to trap and arrest the first accused. A police officer, lance corporal Magendran (PW4) was chosen to act as an agent provocateur. The first accused said that it would cost him RM5,600 a pound. PW4 agreed to buy half a pound for RM2,800. A meeting point was set up. At about 12 noon, the second accused who was riding a motorcycle took out a plastic bag from the motorcycle carrier and handed it over to the first accused. The first accused then handed PW4 a plastic bag. Inside it, was a small tin box. As PW4 struggled to open the tin, the second accused joined them. The second accused pried open the cover of the tin box using his keys. Inside the tin box was a parcel wrapped in Chinese newspaper. There was a white plastic packet inside the parcel containing a granular and powdery pinkish substance which PW4 suspected to be heroin. The second accused held out his hand at PW4 and asked: 'Mana duit?' ('Where is the money?'). PW4 then stood up. He pretended to remove his wallet from his pocket and gave the prearranged signal to his fellow police officers who lay in ambush. The police party then approached the accused and arrested them. Subsequent chemical examination confirmed that the substance in question was 40.45g of heroin which is a proscribed drug under the Act. It was argued whether there had been a sale of the proscribed drug by the accused to PW4.

**Held**, allowing the appeal and substituting it with a conviction under s 12(2) of the Dangerous Drugs Act 1952:

(1) In the present case, the prosecution put their case on the footing that the accused had trafficked in the drug in question. In other words, they put their case under s 39B(1)(a) of the Act. That was readily conceded by the learned

deputy. It is, and was, not the prosecution's case that the accused had offered to traffic in a dangerous drug. It is also not their case that the accused did or offered to do an act preparatory to or for the purpose of trafficking in a dangerous drug. In other words, the prosecution was not relying on s 39B(1)(b) or (c) of the Act (see para 8).

(2) If Parliament wanted to specifically include agreements to sell, offers to sell, or negotiations for sale in the definition of trafficking, it would have done so. In the second place, although the definition of 'trafficking' in s 2 of the Act uses the open ended expression 'includes', this does not per se bring within the purview of the definition complete or inchoate acts that are not specifically mentioned in the definition (see para 11).

(3) The Act is a piece of penal legislation and must therefore receive a strict construction (see *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337). Courts must be most careful to ensure that they do not insert words in the definition so as to enlarge the crime of trafficking. For, it is the task of Parliament and not the courts to create offences. Otherwise, the law will be uncertain and indefinite (see *R v Kelly* (1992) 92 DLR (4th) 643, applied in *Public Prosecutor v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146; *Attorney General v Sillem* (1864) 33 LJ Ex 92) (see para 12).

(4) The definition of 'trafficking' in s 2 of the Act is at best ambiguous because it does not clearly state whether an agreement to sell or negotiations for a sale come within it. Also, acts preparatory to the commission of trafficking are expressly covered by s 39B(1)(c) of the Act and cannot have therefore been intended by Parliament as also coming within the definition in s 2. Otherwise, the definition would suffer from tautology. Being a penal statute, any ambiguity within the Act must be resolved in favour of the accused (see para 14).

(5) It follows that the ambiguity in this case should be resolved in the accused's favour by holding that the acts of 'agreeing to sell', 'offering to sell', 'offering for sale' and 'negotiating a sale' do not fall within the definition of trafficking. And it follows equally that the actus reus of 'selling' refers to an actual sale and nothing short of that (see para 14).

**[Bahasa Malaysia summary**

Terdapat dua perayu-perayu dalam rayuan ini terhadap sabitan mereka atas pertuduhan mengedar heroin sejenis dadah merbahaya bertentangan dengan s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') dibaca dengan s 34 Kanun Keseksaan dan dihukum di bawah s 39B(2) Akta tersebut. Hukuman mati mandatori telahpun dijatuhkan ke atas mereka. Fakta-fakta yang relevan dalam rayuan ini adalah seperti berikut. Seorang perempuan cina telah memanggil ACP Umar AH Saifuddin (PW5) di pejabatnya di cawangan anti narkotik memaklumkan kepada PW5 bahawa dia diugut oleh seorang lelaki cina untuk mencari pembeli untuk setengah paun dadah sebelum 3 petang pada hari yang sama. Polis merumuskan satu rancangan; untuk memerangkap dan menahan tertuduh pertama. Seorang anggota polis, Lance Corporal Magendran (PW4) telah dilantik untuk bertindak sebagai agent provocateur. Tetuduh pertama menyatakan ia berharga RM5,600 satu paun.

PW4 bersetuju membeli setengah paun untuk harga RM2,800. Satu tempat temujanji diaturkan. Lebih kurang 12 tengahari, tertuduh kedua menunggang motosikalnya dan mengeluarkan beg plastik daripada raga motorsikalnya dan memberikannya kepada tertuduh pertama. Tertuduh pertama kemudiannya memberikannya kepada PW4 satu beg plastik. Di dalamnya, terdapat satu kotak tin kecil. Ketika PW4 cuba membukakan tin tersebut, tertuduh kedua bertemu mereka. Tertuduh kedua membukakan penutup kotak tin tersebut menggunakan kuncinya. Di dalam kotak tin terdapat satu bungkusan dibaluti dengan akhbar Cina. Terdapat satu plastik putih dalamnya mengandungi bahan bijian/debu berwarna jingga yang disyaki PW4 sebagai heroin. Tertuduh kedua hulurkan tangannya kepada PW4 dan bertanya: 'Mana duit?'. PW4 kemudiannya berdiri. Beliau berpura-pura mengeluarkan beg wangnya daripada koceknya dan memberi isyarat yang diaturkan sebelumnya kepada pegawai-pegawai polis yang bersembunyi untuk serang hendap. Sepasukan polis kemudiannya menghampiri tertuduh dan menahan mereka. Pemeriksaan kimia yang dijalankan mengesahkan bahan tersebut adalah 40.45g heroin yang diharamkan di bawah Akta tersebut. Ia dihujahkan sama ada terdapat jualan dadah yang diharamkan oleh tertuduh kepada PW4.

**Diputuskan**, membenarkan rayuan tersebut dan menggantikan dengan satu sabitan di bawah s 12(2) Akta Dadah Berbahaya 1952:

(1) Dalam kes ini, kes pihak pendakwa raya ialah bahawa tertuduh mengedar dadah tersebut. Dalam perkataan lain, kes mereka adalah di bawah s 39B(1)(a) Akta tersebut. Ini dipersetujui oleh penolong pendakwa raya yang bijaksana. Ia adalah, dan sentiasa bukan kes pendakwa raya bahawa tertuduh menawarkan untuk mengedar dadah berbahaya. Ia juga bukanlah kes mereka bahawa tertuduh pernah atau menawarkan untuk membuat satu tindakan persediaan kepada atau untuk tujuan mengedar dadah berbahaya. Dalam perkataan lain, pendakwa raya tidak bergantung pada s 39B(1)(b) atau (c) Akta tersebut (lihat perenggan 8).

(2) Sekiranya Parlimen ingin termasuk secara khususnya perjanjian untuk membeli, menawarkan untuk jualan, atau rundingan untuk menjual di dalam definisi pengedaran, ia akan berbuat demikian. Walaupun definisi untuk 'pengedaran' di s 2 Akta tersebut menggunakan perkataan yang terbuka 'termasuk', ini secara per se tidak termasuk dalam definisi tindakan yang sempurna atau belum sempurna yang tidak secara khususnya dinyatakan dalam definisi tersebut (lihat perenggan 11).

(3) Akta tersebut adalah satu undang-undang jenayah dan dengan itu mesti ditafsirkan secara tegas (lihat *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337). Mahkamah-mahkamah harus berhati-hati dalam mempastikan mereka tidak memasukkan perkataan-perkataan di dalam definisi yang membolehkan kesalahan pengedaran diperluaskan. Ini adalah kerana ia adalah tanggungjawab Parlimen dan bukannya mahkamah-mahkamah mewujudkan kesalahan-kesalahan. Sekiranya tidak, undang-undang akan menjadi kurang pasti dan tidak terhad (lihat *R v Kelly* (1992) 92 DLR (4th) 643, yang

digunapakai dalam kes *Public Prosecutor v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146; *Attorney General v Sillem* (1864) 33 LJ Ex 92) (lihat perenggan 12).

(4) Definisi 'pengedaran' di s 2 Akta tersebut adalah paling baik taksa oleh kerana ia tidak secara jelasnya menyatakan sama ada perjanjian untuk menjual atau rundingan untuk jualan termasuk di dalamnya. Selanjutnya, tindakan persediaan dalam melakukan pengedaran diliputi oleh s 39B(1)(c) Akta tersebut dan dengan itu ia tidak boleh dikatakan Parlimen juga menginginkan ia diliputi di definisi s 2. Sekiranya tidak, definisi tersebut akan menjadi sebagai satu tautologi. Sebagai sebuah akta jenayah, sebarang taksah dalam Akta tersebut mesti diselesaikan dengan berpihak kepada tertuduh (lihat perenggan 14).

(5) Ia diikuti bahawa taksah dalam kes ini harus diselesaikan dengan berpihak kepada tertuduh dengan memutuskan bahawa tindakan-tindakan 'perjanjian untuk menjual', 'penawaran untuk menjual', 'penawaran untuk dijual' dan 'rundingan untuk jualan' tidak jatuh di dalam definisi pengedaran. Dengan itu actus reus 'jualan' merujuk kepada jualan yang sebenarnya dan bukan apa-apa yang kurang daripada itu (lihat perenggan 14).]

**Notes**

For cases on drug trafficking, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 112–120.

**Cases referred to**

*Attorney General v Sillem* (1864) 33 LJ Ex 92 (folld)
*Chow Kok Keong v PP* [1998] 2 MLJ 337 (refd)
*Gordon, Re; ex parte Fitzgerald* (1945) 45 SR (NSW) 182 (refd)
*PP v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146 (refd)
*PP v Mohd Azrin Mohd Nor* [2005] 3 MLJ 769 (refd)
*PP v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393 (refd)
*R v Kelly* (1992) 92 DLR (4th) 643 (refd)
*R v Scott* (1990) 20 NSWLR 72 (refd)
*R v Scullion* [2002] WCBJ 7029 (refd)
*Saari bin Jusoh v PP* (Criminal Appeal No J–05–121 of 1995) (refd)

**Legislation referred to**

Companies Code s 5
Crimes Act 1900 s 173
Dangerous Drugs Act 1952 ss 2, 12(2), 39A(2), 39B(1)(a), (b), (c), (2)
Penal Code ss 34, 409
Sale of Goods Act 1957 ss 4(3), 5(1)

**Appeal from**: Criminal Trial No 58–5 of 1994 (High Court, Ipoh)

*Karpal Singh (Jagdeep Singh Deo with him) (Karpal Singh & Co) for the appellants.*
*Meor Hashimi bin Abd Hamid (Peguam Negara Malaysia) for the respondent.*

**Gopal Sri Ram JCA (delivering judgment of the court):**

**[1]** There are two appellants in this appeal. I will for convenience refer to them as the accused. They appealed to us against their conviction on a charge of trafficking in 40.45g of heroin a dangerous drug contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') read with s 34 of the Penal Code and punishable under s 39B(2) of the Act. The mandatory death sentence had been passed upon them. At the conclusion of arguments the appeal was unanimously allowed. Their conviction on the trafficking charge was set aside. Instead, a conviction under s 12(2) of the Act was substituted. The appellants were sentenced to 18 years imprisonment from the date of their arrest. There is a little history to this case. Let me set it out.

**[2]** Initially, the High Court had acquitted the accused at the close of the case for the prosecution. This was on 6 January 1995. However, the Public Prosecutor, being dissatisfied with the order of acquittal appealed to this court. On 9 August 2004 that appeal was allowed. The judgment of the High Court was set aside. The case was remitted to the High Court with a direction that the accused be called upon to make their defence to the charge of trafficking. The trial judge who had heard the case earlier also heard the defence of the accused. He did not accept it. He found them guilty. He convicted them and sentenced them to death. It is against this order that the accused appealed to us.

**[3]** The facts that are relevant to this appeal are as follows. On the afternoon of 2 February 1994, a Chinese lady called on ACP Umar AH Saifuddin (PW5) at his office at the Anti Narcotic Branch of Ipoh Police Headquarter. She informed him that she had been threatened by a Chinese man to find a buyer of half a pound of drugs by 3pm on the same day. PW5 conveyed this information at once to his superior, DSP Mohd Azmir Nadzri (PW7). PW7 asked the lady to inform the Chinese man in question that a prospective buyer had been found but that the transaction could only be completed the next day due to lack of funds. PW7 then instructed PW5 to follow the lady and identify the Chinese man. The lady went to Ipoh Hotel. There she was seen by PW5 talking to a Chinese man who was later identified as the first accused.

**[4]** The following day, that is to say, on 3 February 1994, the lady informant called on PW5 once again. She told PW5 that the first accused had agreed to meet and negotiate with the prospective buyer at 10am at the Ipoh Hotel. The police then formulated a plan; to trap and arrest the first accused. A police officer, Lance Corporal Magendran (PW4) was chosen to act as the prospective buyer. He was to accompany the lady informant and she was to introduce him to the first accused. PW4, acting as an agent provocateur was then to induce the first accused to sell him the drug.

**[5]** According to the evidence of PW4 this is what happened. Both he and the lady informant met with the first accused at the Sun Seng Fatt Restaurant, which was located near the Ipoh Hotel. The lady informant introduced the first accused to PW4

as Ah Min. Following a brief conversation in Chinese between the lady informant and the first accused (a conversation which PW4 did not understand), the former left. According to the evidence of PW4, the first accused then asked the witness: 'Betulkah lu mahu ambil barang?' (Is it true that you want to take the thing?'). PW4 said that he did. The first accused said that it would cost him RM5,600 a pound. PW4 agreed to buy half a pound for RM2,800. The first accused then said that his friend would deliver the drug between 11.30am to 12.30pm and he (PW4) was to wait for him at the main bus station in Bandar Ipoh. PW4 went along to the main bus station. There the first appellant asked the witness to wait at food stall No 4. PW4 did so. At about 12 noon, the second accused who was riding a motorcycle entered the bus station's compound. He approached the first accused who was standing in front of food stall No 4. The second accused took out a plastic bag from the motorcycle carrier and handed it over to the first accused. PW4 and the first accused then proceeded to the food stall. They sat at a table. The first accused handed him a plastic bag bearing the logo of 'Super Kinta' (exh P6A). Inside it, PW4 found a red box with a 'Choices' logo. Inside the red box was a small yellowish tin box (P6C). As PW4 struggled to open the tin, the second accused joined them. The second accused pried open the cover of the tin box using his keys. Inside the tin box was a parcel wrapped in a Chinese newspaper. There was a white plastic packet (P5B) inside the parcel containing a granular and powdery pinkish substance which PW4 suspected to be heroin. The second accused held out his hand at PW4 and asked: 'Mana duit?' ('Where is the money?'). PW4 then stood up. He pretended to remove his wallet from his pocket and gave the prearranged signal to his fellow police officers who lay in ambush. The police party then approached the accused and arrested them. Subsequent chemical examination confirmed that the substance in question was 40.45g of heroin which is a proscribed drug under the Act. Those, then, are the facts.

**[6]** A number of grounds were argued before us. But we find it sufficient to deal with merely one of them. It is whether there had been a sale of the proscribed drug by the accused to PW4. In order to deal with this issue it is necessary to say a few words about the stand taken by the prosecution in the court below. Now, this is a case in which the learned deputy conducting the prosecution departed from well-established practice by making no opening statement. This course places both a trial judge and the defence at a disadvantage because nobody knows what it is exactly that the prosecution is seeking to establish. In *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393, the Federal Court emphasised the importance of the prosecution stating the precise nature of its case against an accused. It was said (at p 407):

> In our view, the problem is easily solved by the prosecution intimating to the defence and to the court at the first available opportunity if its case is one of actual trafficking or if it intends to rely on a presumption to establish trafficking and, if the latter be the case, to identify the precise presumption. This could be done either before the commencement of the trial or as part of the opening speech and would go a long way in assisting the defence in directing its cross examination along appropriate lines and thereby avoiding a waste of the court's time. See *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705, applying *Public Prosecutor v Okonkwo & Anor* [1993] 3 SLR 610.

**[7]** However, it is clear from the way in which the case for the prosecution was presented and argued in the court below — and this was readily conceded by the learned deputy who argued this appeal before us — that the prosecution's case against the accused was one of actual trafficking in that they sold the proscribed drug to PW4. Now, s 39B(1) creates three distinct offences of which trafficking is one. This is what the section says:

> s 39B(1) No person shall, on his own behalf or on behalf of any other person, whether or not such other person is in Malaysia —
>
> (a) traffic in a dangerous drug;
>
> (b) offer to traffic in a dangerous drug; or
>
> (c) do or offer to do an act preparatory to or for the purpose of trafficking in a dangerous drug.
>
> (2) Any person who contravenes any of the provisions of subsection (1) shall be guilty of an offence against this Act and shall be punished on conviction with death.

**[8]** In the present case, the prosecution put their case on the footing that the accused had trafficked in the drug in question. In other words, they put their case under s 39B(1)(a) of the Act. That was readily conceded by the learned deputy who argued the case before us. It is, and was, not the prosecution's case that the accused had offered to traffic in a dangerous drug. It is also not their case that the accused did or offered to do an act preparatory to or for the purpose of trafficking in a dangerous drug. In other words, the prosecution was not relying on s 39B(1)(b) or (c) of the Act. To emphasise the point once again, the case for the prosecution in the court below was, and before us is, one of actual trafficking within s 39B(1)(a) of the Act.

**[9]** Trafficking is defined by s 2 of the Act as follows:

> In this Act, unless the context otherwise requires —
>
> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act.

**[10]** In relation to the facts of this case, it is, as I have already said, the prosecution's case that the accused sold the drug in question to PW4. The facts must therefore show — to use the expression in s 2 of the Act — a 'selling' of the drug to PW4. Mark, that the section does not say 'agreeing to sell' or offering to sell', or 'offering for sale' or 'negotiating a sale'. It says 'selling'. And; for reasons I shall give in a moment;-in my judgment, the expression 'selling' in s 2 refers to an actual sale.

**[11]** In the first place, if Parliament wanted to specifically include agreements to sell, offers to sell, or negotiations for sale in the definition of trafficking, it would have done so. In the second place, although the definition of 'trafficking' in s 2 of the Act uses the open ended expression 'includes', this does not per se bring within the

purview of the definition complete or inchoate acts that are not specifically mentioned in the definition. As Augustine Paul J (as he then was) said in *Public Prosecutor v Hairul Din bin Zainal Abidin* [2001] 6 MLJ 146 (at p 156):

> ... the definition provided in s 2 of the Act is not exhaustive as it only '... includes...' the acts enumerated therein is capable of including other acts not specified. Be that as it may, it is my view that *the definition provision cannot be widely construed so as to include any conceivable act that may come within its ambit*... (Emphasis added.)

**[12]** This brings me to the third point. It really follows from the second. And it is this. The Act is apiece of penal legislation and must therefore receive a strict construction. See *Chow Kok Keong v Public Prosecutor* [1998] 2 MLJ 337. Courts must be most careful to ensure that they do not insert words in the definition so as to enlarge the crime of trafficking. For, it is the task of Parliament and not the courts to create offences. Otherwise, the law will be uncertain and indefinite. See *R v Kelly* (1992) 92 DLR (4th) 643, applied in *Public Prosecutor v Hairul Din bin Zainal Abidin*. The approach I take is one that has been settled by high authority. Thus, in *Attorney General v Sillem* (1864) 33 LJ Ex 92 at p110. Pollock CB said:

> If I were asked whether there be any difference left between a criminal statute and any other statute not creating an offence, I should say that in a criminal statute you must be quite sure that the offence charged is within the letter of the law.

**[13]** *Re Gordon; ex parte Fitzgerald* (1945) 45 SR (NSW) 182 provides an apposite analogy to the present appeal. The accused in that case was a doctor. He had issued a certificate with regard to the sanity of a person who had been voluntarily admitted to a mental hospital. But he had not first examined the person concerned. Under the relevant statute, it was clearly an offence to issue a certificate in respect of a person compulsorily committed to an asylum. However, the statute in question was silent in regard to certificates relating to voluntary admissions. The accused was acquitted. Jordan Chief Justice when delivering the judgment of the court accepted that the action of the doctor may have been within the class of mischief intended to be proscribed by the statute but held that it was not in fact covered by the statute. The learned Chief Justice said (at p 186):

> If conduct of a particular kind stands outside the language of a penal section, the fact that a court takes the view that it is through inadvertence of the Legislature that it has not been included does not authorise it to assume to remedy the omission by giving the penal provision a wider scope than its language admits.

**[14]** Fourthly, the definition of 'trafficking' in s 2 of the Act is at best ambiguous because it does not clearly state whether an agreement to sell or negotiations for a sale come within it. Also, acts preparatory to the commission of trafficking are expressly covered by s 39B(1)(c) of the Act and cannot have therefore been intended by Parliament as also coming within the definition in s 2. Otherwise, the definition would suffer from tautology. Being a penal statute, any ambiguity within the Act must be resolved in favour of the accused. As observed by Rothman JA in *R v Scullion* [2002] WCBJ 7029:

A I am further aware of the principle requiring that criminal or penal statutes affecting the liberty of the subject should be very carefully construed. If real ambiguities are found or doubts of substance arise, then the statute should be applied in such manner to favour the person against whom it is sought to be enforced (*Marcotte v Deputy Attorney General for Canada* [1976] 1 SCR 108, p 115).

B It follows, in my judgment, that the ambiguity in this case should be resolved in the accused's favour by holding that the acts of 'agreeing to sell', 'offering to sell', 'offering for sale' and 'negotiating a sale' do not fall within the definition of trafficking. And it follows equally that the actus reus of 'selling' refers to an actual sale and nothing short of that.

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**[15]** At this juncture, I find it convenient to refer to the decision in *Public Prosecutor v Mohd Azrin Mohd Nor* [2005] 3 MLJ 769. In that case, the court looked to the Sale of Goods Act 1957 for guidance on the question of what amounted to a sale. In particular, reference was made to ss 4(3) and s 5(1) of the 1957 Act. D These sections provide as follows:

4(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale,

5(1) A contract of sale is made by an offer to buy or sell goods for a price and the acceptance E of such offer.

I think that it was perfectly proper for the learned judge in *Mohd Azrin Mohd Nor* to seek guidance from the Sale of Goods Act 1957. And, while I am in full agreement with the ultimate result in that case; the product of careful reasoning; I must respectfully state that I am unable to agree with the finding in that case that by an F application of s 5(1) of the 1957 Act, an offer followed by an acceptance of it constitutes a sale of a drug. In my judgment, such an exchange of reciprocal promises, even by the ordinary principles of the law of contract, merely amounts to an agreement to sell. But there is a more serious objection to the application of s 5(1) of the 1957 Act. It is this. It is contrary to established principles of statutory G construction to use the definition found in one Act of Parliament to ascertain the meaning of the same or a similar term or expression in another.

**[16]** In *R v Scott* (1990) 20 NSWLR 72, the accused Scott was charged under s 173 of the Crimes Act 1900 (NSW) for having fraudulently converted to his own use H certain property belonging to a public company. This is the equivalent of s 409 of our Penal Code. The main issue was whether the accused was a director and therefore an officer of the company in question. The Crimes Act did not contain any definition of the expression 'officer'. The trial judge directed the jury on the basis that the definition of the expression 'officer' appearing in s 5 of the Companies Code (NSW) was to be used to find criminal liability on the part of the accused. The accused was I convicted. On appeal, the Court of Criminal Appeal allowed the appeal, quashed the conviction and ordered a re-trial making it quite plain that it was not open to a court to use the definition contained in one piece of legislation to interpret the same or similar term in another. In the course of delivering the court's judgment, Gleeson CJ said:

> Quite part from considerations of authority there are two major logical difficulties about that process of reasoning. The first is that s 5 of the [Companies] Code says that 'in this Code', unless the contrary intention appears, 'officer' includes 'employee'. It does not say that it has that meaning in the Crimes Act. The legislature has never defined 'officer' in the Crimes Act. The second difficulty is that, by definition, the term 'officer' has different meanings in different provisions of the Companies Code. What reason is there for selecting one of those meanings, rather than another, for importation into the Crimes Act? As was pointed out on behalf of the appellant, bearing in mind that s 173 is a penal provision, and the nature of its subject matter, if one had to choose between different definitions in the Code there would be much to be said for choosing the narrower.

**[17]** So too here. Section 2 of the Act does not say that 'selling' has the same meaning as that found in s 5(1) of the 1957 Act. Neither does the Sale of Goods Act say that the expression 'selling' found in any Act is to have the same meaning as that found in s 5(1). So it is quite impermissible to use s 5(1) of the 1957 Act to determine when an act of 'selling' takes place within s 2 of the Act.

**[18]** Before concluding, I would point out that this court has very recently held in *Saari bin Jusoh v Public Prosecutor* (Criminal Appeal No J–05–121 of 1995) that for there to be a sale under s 2 of the Act:

> there must have been an actual delivery of the drugs by the appellant accompanied by the physical handing over of the agreed price by the agent provocateur in exchange.

**[19]** Returning to the present instance, it is my judgment that on the peculiar facts here, and having regard to the authorities already discussed, there was no act of selling by either accused to PW4 as required by s 2 of the Act. In the circumstances, the appeal was allowed and the conviction of the accused under s 39B was quashed. The sentence of death was set aside. The accused were convicted of an offence under 12 read with s 39A(2) of the Act and sentenced to 18 years imprisonment less the time already served by them.

**[20]** My learned brothers, Zulkefli and Suriyadi JJCA have seen this judgment in draft and have expressed their agreement with it.

*Appeal allowed.*

Reported by Sally Kee